No. 134

(20)

IN THE

Supreme Court of the United States

October Term, 1944

ROY K. O'KELLEY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

AND

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

HENRY LINCOLN JOHNSON, JR.,
Attorney for Petitioner.

Printed by Law Reporter Ptg. Co., 518 5th St., Washington, D. C.

INDEX

TABLE OF CASES CITED

STATUTE INVOLVED

The Marihuana Tax Act of 1937, as amended (26 U. S. C. 2590 through 2593).

In The

Supreme Court of the United States

October Term, 1944

Roy K. O'Kelley, *Petitioner*,

v.

United States of America, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully represents:

(1)

That on April 16, 1945 the United States Court of Appeals for the District of Columbia, affirmed a judgment of conviction in a criminal case against petitioner which had been entered in the District Court of the United States for the District of Columbia. The Court in its opinion, while reversing an order the first count of the indictment, affirmed the conviction on the second count. Petition for a rehearing was denied April 12, 1945.

(2)

The two counts of the indictment were for the illegal possession of marihuana, as defined by the Marihuana Tax Act of 1937, as amended.

(a) Count 1 charges possession of certain marihuana found in petitioner's apartment at 1701 New Jersey Avenue N.W. in the District of Columbia, on March 26, 1944.
(b) Count 2 charges possession of marihuana at an apartment of petitioner on Providence Street N.E. in the District of Columbia, on March 26, 1944 "*But at a time other than that referred to in the first count.*"

Judgment of conviction was entered against petitioner on August 2, 1944 and he was sentenced to imprisonment for a period of sixteen (16) months to four (4) years and pay a fine of Five Hundred ($500.00) Dollars on the first count; and sixteen (16) months to four (4) years on the second count of the indictment, said sentence to run concurrently with sentence imposed in the first count.

PERTINENT FACTS

Narcotic agents, without a search warrant for premises, or arrest warrant for petitioner, illegally and wrongfully entered his apartment on New Jersey Avenue, at 2:30 a. m. and searched this premises while he was in bed. (See opinion below, R. pgs. 30, 31, holding New Jersey Avenue entry, search, seizure and arrest illegal.) Petitioner alleged, on his motion to suppress (R. pgs. 7, 8) by affidavit and by testimony, that the officers proceeded to wreck the New Jersey Avenue furnishings; this was not denied by answer or testimony, except that one agent when asked whether the picture of the premises exhibited to him by counsel reflected the result of his search replied, "he didn't remember". (R. pg. 15.) That petitioner was removed to police headquarters

where O'Kelley was informed that they knew of his apartment on Providence Street, and they would do what they did on New Jersey Avenue, unless he should get "the rest of his supply" for them. Petitioner testified they informed him they were going there anyway, whereupon he acquiesced (R. pg. 17) and the marihuana upon which the second count was held was obtained (none of this was denied by government witness).

The Appellate Court erred when, despite its finding that the entry, search and seizure on New Jersey Avenue, illegal, and petitioner's "claimed consent," if any, was under "compulsion," it rules the production of other information and property, the same morning and in the same transaction, while still illegal in custody, compulsion free.

QUESTIONS PRESENTED

1

Are any of the fruits of an illegal entry upon and search of petitioner's premises, or any information or contraband secured by exacting admissions from accused, while admittedly under the coercive atmosphere of an illegal arrest, admissable in evidence over his timely objection?

O'Kelley, the Court below admitted, (R. pg. 31), gave consent "under compulsion" to the search at New Jersey Avenue, and it condemned the use of that evidence in the first count of his indictment. How, within the hour, when removed to the Narcotic Squad Room at Police Headquarters, still in illegal custody, the pattern of fear and the pain of his unlawful detention became dissipated so that his subsequent admissions and the production of the marihuana on Providence Street came as a result of his free will, is unexplained in the evidence. No interval occurred between first production of marihuana and the second except a trip to the Police Headquarters and further conversations with the petitioner.

2

Does the mere possession of marihuana in two dwellings by the accused give rise to two distinct violations of Section 2593 of the Marihuana Tax Act of 1937, as amended?

No testimony was produced as to where or from whom petitioner got the marihuana except that petitioner said he got it "from a source out West" (R. pg. 20); during no part of the entire proceeding was there any intimation that he had on two separate occasions obtained the marihuana. For all that the evidence shows he may have obtained it all at the same time. The only fact shown, except such as will arise by presumption in the statute, was the fact that on March 26, 1944, petitioner had some marihuana on New Jersey Avenue and that he had some on Providence Street. Where, as here, the gravamen of the tax suit is that he failed to pay a tax on the marihuana as a transferee, it would seem that if he bought it all at once he failed to pay the tax at that time, logic would seem to interdict a conclusion that he necessarily bought it in two lots where there is no evidence adduced in support of such a fact.

3

The presumption in Section 2593 of the Marihuana Act of 1937, as amended, violates the Fifth Amendment, in that it is arbitrary and unreasonable as applied in the case at bar.

No proof that a crime was committed except that furnished by the bare minimum of evidence declared by, the act to be "presumptive evidence of guilt." Your petitioner claims that where, as here, the only evidence produced is that of admissions of the accused, independent proof is necessary to prove corpus delicti. Due process requires that proof be presented, first, that a crime was committed, second, evidence fastening the crime upon the accused as the guilty person.

REASONS FOR GRANTING WRIT

Your petitioner respectfully urges that as shown above and as will be further urged in the brief accompanying this petition, the United States Court of Appeals for the District of Columbia has rended a decision in conflict with applicable decisions of this Court, has decided important questions of Federal Law in a manner which leaves such questions and the state of the law in grave doubt, and that the questions presented are of wide interest and application.

WHEREFORE, your petitioner prays that a writ of certiorari issue out of and under the seal of this Court to the United States Court of Appeals for the District of Columbia, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of record and all proceedings had herein and that the order of said United States Court of Appeals for the District of Columbia affirming the judgment of conviction in this cause be reversed and that petitioner may have such other relief as this Court may deem appropriate.

Dated June 18th, 1945.

ROY K. O'KELLEY

By _____

Attorney.

DISTRICT OF COLUMBIA, *ss:*

Henry Lincoln Johnson, Jr., being first duly sworn according to law deposes and says: I am attorney for the petitioner herein; said petitioner is incarcerated; I have read the foregoing petition and know the contents thereof. The facts therein stated are true to my best information and belief.

Subscribed and sworn to before me this 18th day of June, 1945.

Notary Public, D. C.

In The

Supreme Court of the United States

October Term, 1944

No. ———

Roy K. O'Kelley, *Petitioner*,

v.

United States of America

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion Below

The opinion of the Court of Appeals was rendered on April 16, 1945, but is as yet unreported.

Jurisdiction

The opinion of the Court of Appeals was entered on April 16, 1945 (R. 29) and petition for a rehearing was denied on May 12, 1945 (R. 35). The jurisdiction of this Court is invoked under Section 237 and 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938.

Questions Presented

1

Are any of the fruits of an illegal entry and search of defendant's premises, or any information or contraband secured by exacting admissions from accused while admittedly under the coercive atmosphere of illegal arrest, admissible in evidence over his timely objection?

The Court below found "abundant" evidence in the record to show that O'Kelley was under illegal arrest at 1701 New Jersey Avenue, where the officers illegally secured the evidence covered in the first count of the indictment. Petitioner's claimed consent to that search was dismissed as having been "wrung" from him under compulsion (see opinion of Court below (R. pg. 31)). It further appears from the testimony on the motion to suppress, without contradiction, that the officers wrecked the New Jersey Avenue apartment (R. pg. 17). When, however, O'Kelley was removed from his apartment and transferred to the "reassuring" privacy of the narcotic squad room, further conversations were had with him which resulted in obtaining "the rest of his supply" (R. pgs. 14, 17), which formed the basis of the second count of the indictment. Just how, within the hour, and still under illegal arrest, and in custody of officers still flushed with the heat of their disregard of his personal rights, his admissions and acquiescence in their demands with respect to the "rest of his supply" became the product of his free and voluntary will, is totally unexplained. Where the conclusion is reached that O'Kelley was coerced on New Jersey Avenue, reason would dictate that unless some convincing evidence that the coercion is dispelled, a recuperative interval elapsed or some metamorphosis had occurred by virtue of which O'Kelley regained his free will, the atmosphere first obtaining on New Jersey Avenue continued. Now, completely under their control, and with

fresh recollection of their unrestrained conduct on New Jersey Avenue, it is small wonder that their intimation of a repetition on Providence Street (R. pg. —) produced the same results as their previous actual unlawful conduct.

Cf. Malinski v. The People of New York (Number 367, March 26, 1945) — U. S. —.
U. S. v. Baldocci, 42 Fed. (2d) 567.

Here, in addition, we have an arrest—unlawful at that—incidental to a search, not only of New Jersey Avenue, as the search went on before and after his arrest there, but continued also at Police Headquarters for information, and at Providence Street for confirmation of the information exacted there.

Cf. Henderson v. U. S., 12 Fed. (2d) 528.
Also see: Weeks v. United States, 232 U. S. 383, 58 L. Ed. 652. Frat. Order of Eagles v. U. S., 57 Fed. (2d) 93, 94.

The fact that this search of petitioner's premises and person and the coercively induced confessions or admissions produced contraband, does not validate or render the fruit admissible against the victim.

Byars v. U. S., 273 U. S. 28, 71 L. Ed. 520.
United States v. Setaro (D. C. Com.), 33 Fed. (2d) 134.

And the admissions, confessions and evidence obtained through and by virtue of their unlawful conduct cannot be used as evidence to convict petitioner.

Nusslein v. District of Columbia, 73 Apps. D. C. 85, 115 Fed. (2d) 690.

2

Does the mere possession of marihuana in two dwellings by the accused give rise to two distinct violations of Section 2593 of the Marihuana Tax Act of 1937?

Petitioner was charged with two violations of Section 2593 of Title 26 of the U. S. C. which provides as follows:

> (a) It shall be unlawful for *any person who is a transferee* required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a).

Section 2590 (a) provides as follows:

> (a) There shall be levied, collected, and paid upon *all transfers* of marihuana which are required by section 2591 to be carried out in pursuance of written order forms, taxes at the following rates:
>
> (1) Upon *each transfer* to any person who has paid the special tax and registered under sections 3230 and 3231, $100 per ounce of marihuana or fraction thereof.
>
> (2) Upon *each transfer* to any person who has not paid the special tax and registered under sections 3230 and 3231, $100 per ounce of marihuana or fraction thereof.

The petitioner, the record shows, had two apartments, one on New Jersey Avenue and one on Providence Street, both in the District of Columbia. In each apartment on March 26, 1944, he had a certain amount of marihuana. The indictment in this cause charges him with illegal possession (*sic*) a violation of section 2593 of the Marihuana Tax

Act of 1937 on March 26, 1944. The theory of the government in this case is that the marihuana at each apartment gave rise to two violations of the same statute. In its proof, however, the government does not attempt to show that petitioner "being a transferee" acquired the marihuana at different times but relies wholly upon the presumption contained in the statute.

Petitioner claims that the record only reveals evidence of one offense and that the lower court erred in affirming one count of his indictment and remanding the other count for a new trial. Possession, the basis from which guilt of the offense charged springs, is an abstract concept, continuous in nature and contra-distinguished from a single, separate act complete *uno ictu*. A somewhat similar charge was held by this court to constitute but one offense. In re Snow 120 U. S. 274, 30 L. Ed. 658. It is not the prerogative of the government to divide one crime into parts "A" and "B" merely by separating the quantities of the contraband, the possession of which marks the petitioner. The test to be applied in these type of cases was aptly put in Blockburger v. United States, 284 U. S. 299, 76 L. Ed. 306, at 308:

> "It is a continuous offense, having duration and not an offense consisting of an isolated act.
>
> "A distinction is laid down in adjudged cases and in textwriters between an offense continuous in character, like the one at bar, and a case where the statute is aimed at an offense that can be committed uno ictu. . ."

Here the gravamen of the offense is to obtain marihuana from a person without paying the tax; possession plus failure to exhibit an order form, being presumptive evidence thereof under the statute.

No attempt was made by the respondent to show that petitioner obtained each portion of the marihuana at a different time. Just how the presumption could also differentiate between the counts and supply to the jury the fact of

the separate acquisition of each portion of the contraband so as to justify double conviction is a legal anathema.

Compare:

3

The presumption in Section 2593 of the Marihuana Act of 1937, as amended, violates the Fifth Amendment, in that it is arbitrary and unreasonable as applied in the case at bar.

In the case at bar petitioner is charged with two violattion of the same section of the Marihuana Tax Act because the officers found he had marihuana in his possession in two dwelling houses in the District of Columbia. There is no difference in the proof required on one than of the other, except the place where the contraband was found. Your petitioner complains that the presumption of guilt arising from the possession of marihuana, and failure to exhibit an order form, bears no reasonable relationship to the fact to be inferred—i. e., that the petitioner acquired the marihuana from another person, and that in the case at bar, that he acquired the marihuana on New Jersey Avenue from some person at a different time from the occasion when he obtained that found on Providence Street. There is no testimony as to how or when any of the marihuana was acquired, or from whom. Your petitioner says that, as applied in the instant case, the presumption is unreasonable and arbitrary and violates the due process clause of the Fifth Amendment.

Bailey v. Alabama, 219 U. S. 219, 55 L. Ed. 191.

This Court announced the rule in Western A. R. Co. v. Henderson, 279 U. S. 639, 73 L. Ed. 884, at page 888:

> "Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational con-

> nection between what is proved and what is to be inferred. . . . A statute creating a presumption that is arbitrary or that operates to deny fair opportunity to repel it, violates the due process clause of the 14th Amendment.* Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

Here the petitioner charged with two crimes, one of which has been reversed on his complaint, petitioner to avail himself of the opportunity to deny the second, must admit the first. The best governmental technique would be to charge every man twice under these circumstances, but let him avail himself of his constitutional rights on the first count, and he is impaled on the decoy count; if he confesses he only acquired both portions at one time he foregoes his constitutional rights by his judicial admission. This type of Pyrrhic victory cannot be the "fair opportunity" described in the Henderson case, supra. If it is, then the observations of Justice McReynolds in Casey v. U. S., 276 U. S. 413, 72 L. Ed. 632, at 635, would seem to be a correct interpretation of the advance of civilization.

CONCLUSION

For the foregoing reasons, it is submitted that the serious questions of law involved in this application are of sufficient importance to require exercise of this Court's jurisdiction by writ of certiorari.

Dated June —, 1945.

Respectfully submitted,

HENRY LINCOLN JOHNSON, JR.,
Attorney for Petitioner.

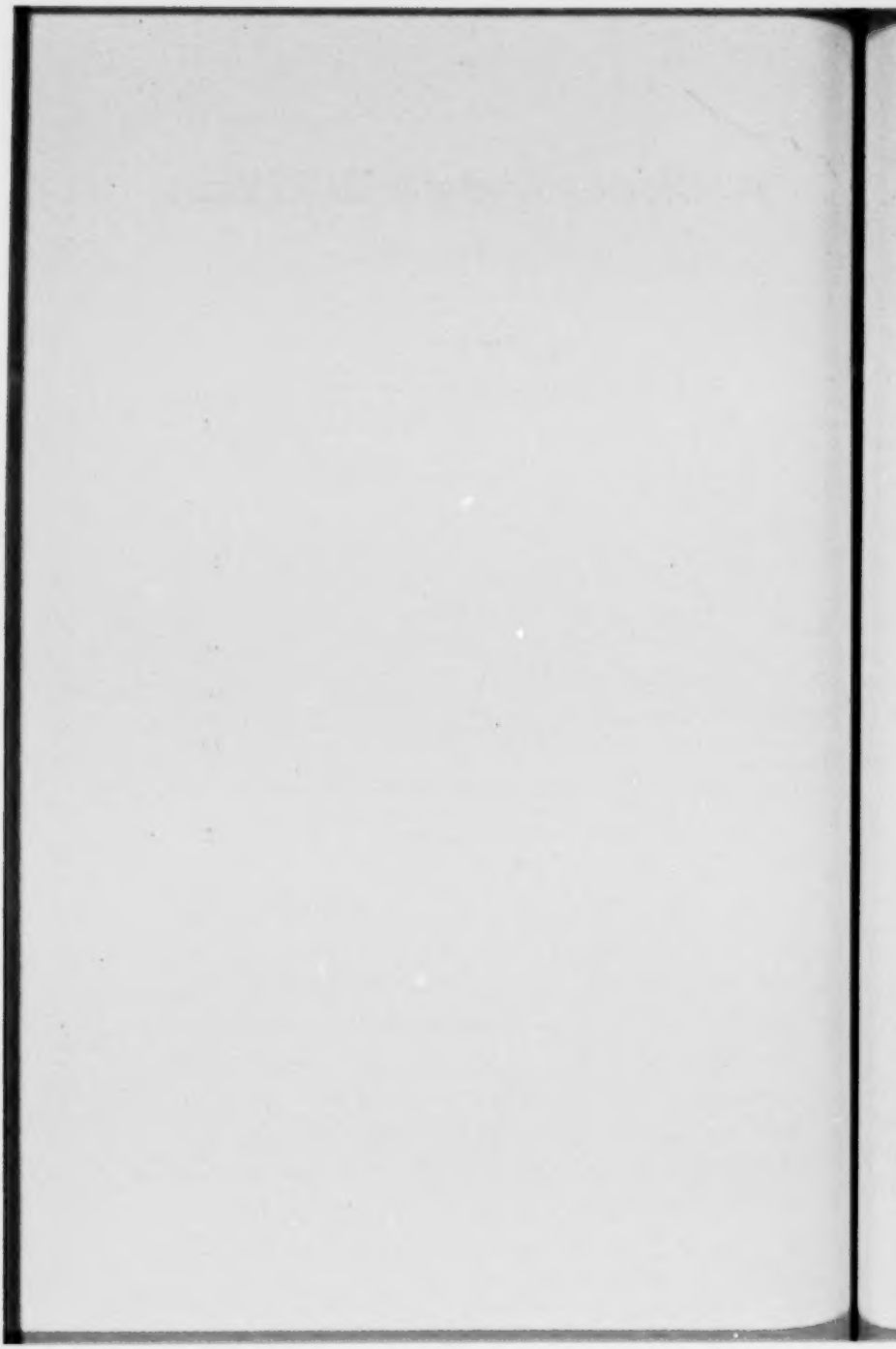
---

* The due process clause under the Fifth Amendment is co-extensive with that under the 14th with reference to the restraint imposed. Cf. Heiner v. Donnan, 285 U. S. 312, 76 L. Ed. 772, at 779.

INDEX

CITATIONS

655071—45



In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 134

ROY K. O'KELLEY, ALIAS ROY KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 29–33) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered April 16, 1945 (R. 34), and a petition for rehearing was denied May 12, 1945 (R. 35). The petition for a writ of certiorari was filed June 18, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Petitioner was arrested when a search of his apartment after an illegal entry resulted in the discovery of marihuana. After his arrest he turned over to officers marihuana kept at another apartment which he occupied. The possession of this second batch of marihuana forms the basis of the count of the indictment on which petitioner stands convicted. The principal question presented is whether the illegality of the original search and arrest rendered inadmissible the evidence subsequently turned over by petitioner to the officers.

STATUTES INVOLVED

The Marihuana Tax Act of August 2, 1937, c. 553, 50 Stat. 554, as reenacted in the Internal Revenue Code, 53 Stat. 279 ff, 26 U. S. C. 2590 ff, provides in pertinent part as follows:

> SEC. 2590 (a) There shall be levied, collected, and paid upon all transfers of marihuana which are required by section 2591 to be carried out in pursuance of written order forms, taxes at the following rates:
>
> (1) Upon each transfer to any person who has paid the special tax and registered under sections 3230 and 3231, $1.00 per ounce of marihuana or fraction thereof.
>
> (2) Upon each transfer to any person who has not paid the special tax and registered under sections 3230 and 3231, $100 per ounce of marihuana or fraction thereof.

(b) Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 2591 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax.

SEC. 2591 (a) It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary.

* * * * * * *

(d) Each such order form sold by a collector shall be prepared by him and shall include an original and two copies, any one of which shall be admissible in evidence as an original. The original and one copy shall be given by the collector to the purchaser thereof. The original shall in turn be given by the purchaser thereof to any person who shall, in pursuance thereof, transfer marihuana to him and shall be preserved by such person for a period of two years so as to be readily accessible for inspection by any officer, agent, or employee mentioned in section 2595. The copy given to the purchaser by the collector shall be retained by the purchaser and preserved

for a period of two years so as to be readily accessible to inspection by any officer, agent, or employee mentioned in section 2595. The second copy shall be preserved in the records of the collector.

SEC. 2593 (a) It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a).

SEC. 2596. Any person who is convicted of a violation of any provision of this subchapter or part VI of subchapter A of chapter 27 shall be fined not more than $2,000 or imprisoned not more than five years, or both, in the discretion of the court.

SEC. 2597. It shall not be necessary to negative any exemptions set forth in this subchapter or part VI of subchapter A of chapter 27 in any complaint, information, indictment, or other writ or proceeding laid or brought under this subchapter or part VI of subchapter A of chapter 27 and the burden of proof of any such exemption shall be upon the defendant. In the ab-

sence of the production of evidence by the defendant that he has complied with the provisions of section 3231 relating to registration or that he has complied with the provisions of section 2591 relating to order forms, he shall be presumed not to have complied with such provisions of such sections, as the case may be.

STATEMENT

An indictment in two counts was returned against petitioner in the United States District Court for the District of Columbia, each count charging him with being a transferee of marihuana and with having acquired a different quantity of marihuana without having paid the transfer tax required by law (*supra*, pp. 2–5, R. 3–4). Petitioner pleaded not guilty and moved to suppress certain evidence which had been seized by the Government (R. 5–6, 8, 11). At the hearing on this motion, the following testimony was adduced:

Agents of the Treasury Department who had twice seen one Burch Williams pass marihuana cigarettes to an informer at the front entrance to premises located at 1401 New Jersey Avenue, N. W., in the District of Columbia, obtained a warrant for the arrest of Williams (R. 12–13). At 2:00 A. M. on the morning of March 26, 1944, the agents, accompanied by local police officers and a deputy United States marshal, went to the New Jersey Avenue address and knocked on the front door, which is the common entrance to two apartments located there (R. 13, 14–15, 16). The

door was opened by one Gibson.[1] The agents told Gibson they had a warrant, and Gibson then admitted them to an apartment in the house. (R. 13, 16.) One of the agents asked Gibson to identify himself by showing his draft card. Gibson then took a handkerchief from his pocket and threw it toward the sofa in the room. An agent saw something drop and found it to be a marihuana cigarette. He also found a package of 35 marihuana cigarettes behind the sofa. The agent then asked who owned the apartment and was told that petitioner did. (R. 13.) Petitioner, who was sleeping in the next room, was awakened and asked if there was any marihuana in the house (R. 13, 15). When he replied in the negative, the agents asked him if he "minded if they looked the place over for marihuana," and petitioner told them to "go ahead" (R. 13). In the search they found an unused record player which, when forced open, was found to contain 50 marihuana cigarettes. Petitioner produced the key to the cabinet and admitted that the cigarettes were his, but stated that they were for his own use. (R. 14.)

Petitioner was arrested and taken to police headquarters. There he was asked if he was willing to surrender other quantities of marihuana which the agents believed he had at an apartment on Providence Street, N. E. Petitioner replied that he was willing to do so. He accompanied

[1] Gibson was separately indicted but tried together with petitioner (R. 10, 11).

the officers to the Providence Street apartment and there turned over to them hat boxes containing marihuana cigarettes, bulk marihuana, and marihuana seeds. (R. 14.)

Petitioner testified that on the night the agents searched his New Jersey Avenue apartment he was unaware of anything unusual until he was awakened by a flash light in his face; that he did not consent to the search of his apartment by the officers, and that the officers in their search upset his furniture and ripped open the mattress on the bed where he had been sleeping. He said that while he was held at police headquarters the agents told him they knew about his wife's apartment on Providence Street and asked him if there was any marihuana there, that they told him they were going to search it whether he agreed or not, and that thereupon he "acquiesced in their demands." (R. 16–17.) He admitted on cross-examination that on the day following his arrest he voluntarily went to the office of the narcotic agents and told them that he had supplied Gibson with marihuana and that he had obtained his supply from "a source in the Middle West" (R. 17).

The court overruled the motion to suppress the evidence secured at both of petitioner's apartments (R. 17), and petitioner was tried before a jury (R. 18). The testimony of the agents and officers before the jury was substantially the same as that given on the motion to suppress (R. 18–25). There was also testimony that demand had

been made upon petitioner by a deputy collector of internal revenue for the production of the order forms required by law for the transfer of marihuana (*supra,* p. 3), and that petitioner had failed to produce such forms (R. 25).

Petitioner was convicted on both counts and sentenced to imprisonment for a period of 16 months to 4 years and to pay a fine of $500 on the first count, and to a concurrent prison sentence of 16 months to 4 years on the second count (R. 11). On appeal, the court of appeals held that the search of the New Jersey Avenue apartment was illegal in that entrance had been gained by subterfuge, and that petitioner's consent given at a time when the officers were already in the room and had already found evidence of marihuana, was not such a free and voluntary consent as to cure the original illegality (R. 30–32). It accordingly reversed petitioner's conviction on the first count of the indictment, which was based upon the marihuana seized at the New Jersey Avenue apartment (R. 34). The judgment on the second count, based upon the marihuana turned over by petitioner at the Providence Street apartment, was affirmed (R. 34) on the ground that the disclosure of this marihuana was voluntary and that its admissibility was unaffected by the illegality of the first search (R. 32).

ARGUMENT

Petitioner contends (Pet. 3, 8–9) that the illegality of the search of his New Jersey Avenue

apartment and of his arrest on the basis of the evidence thus found, served to render involuntary his consent to turn over the marihuana kept at his Providence Street apartment. There is no merit in this contention. The court of appeals held the initial search invalid primarily because entrance to the apartment was obtained by subterfuge. Petitioner testified that, in the search of the New Jersey Avenue apartment, the agents had upset and damaged his furniture and furnishings (R. 17); the court's holding [redacted] that petitioner's consent to that search was given under compulsion was based on the circumstance that the agents were already in the room and had already found evidence of contraband. No such factors are present in respect of the marihuana kept at the Providence Street apartment. Petitioner agreed to and did accompany the agents to that apartment, unlocked the door, and turned over the boxes containing marihuana. His own testimony that he agreed to do so because the agents told him they knew about the apartment and were going to search it, does not establish lack of voluntary consent. Cf. *DeLapp* v. *United States,* 53 F. 2d 627 (C. C. A. 8), certiorari denied, 284 U. S. 684.

2. Petitioner's contention that the mere possession of different quantities of marihuana at different places cannot constitute two separate offenses without affirmative proof that the drugs were transferred at different times (Pet. 2, 10–12), and his attack on the validity of the presump-

tion created by the statute (*supra,* pp. 4–5), in so far as it may operate to render him separately liable for possession at two different places (Pet. 12–13), are irrelevant, since, at this time, he stands convicted of only one illegal transfer of marihuana, based upon the quantity of the drug found in his possession at the Providence Street apartment.[2] The reasonableness of the statutory presumption that possession and failure to produce the necessary forms are prima facie evidence of the unlawfulness of the transfer (*supra,* pp. 4–5) is, under the authorities, not open to question. *Casey* v. *United States,* 276 U. S. 413, 418; *Yee Hem* v. *United States,* 268 U. S. 178, 185; see also *Rossi* v. *United States,* 289 U. S. 89, 91.

CONCLUSION

The decision below is correct. The case presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

HUGH B. COX,
Acting Solicitor General.
JAMES M. MCINERNEY,
Acting Head, Criminal Division.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

JULY 1945.

[2] The United States Attorney's Office informs us that a *nolle prosequi* will be entered as to the first count.

U. S. GOVERNMENT PRINTING OFFICE: 1945